State Public Service Commission, Sarawak v Sarjit Singh Khaira

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-9 OF 1999(Q)
EUSOFF CHIN CHIEF JUSTICE, WAN ADNAN CJ (MALAYA) AND ABDUL MALEK AHMAD FCJ
6 JULY 2000

Administrative Law *— Rights and liabilities of public servants — Dismissal — Refusal to comply with transfer order — Who had power to transfer — General Orders of the Government of Sarawak general order 40 — Constitution of the State of Sarawak art 36(1) — Public Service Commission Rules 1964 r 7*

The respondent was appointed a public officer by the appellant on 2 October 1961. On 16 April 1975, by way of appointment by transfer, he was made senior accounting officer ('SAO') in the Jabatan Kerja Raya ('JKR') in Simanggang. In 1977, he was transferred to the JKR in Kuching. On 28 April 1987, he was directed by the State Secretary to report and serve as SAO in the Treasury Department in Limbang. The respondent refused to comply with the transfer order and the State Secretary reported the matter to the appellant which, following disciplinary action, dismissed the respondent from the SAO in the Sarawak Civil Service on 14 December 1988 effective from 1 January 1989. The respondent applied for an order of certiorari against the appellant to declare his dismissal unlawful. The High Court held that the SAO's scheme to which the respondent belonged was not a common user scheme (see [1990] 2 MLJ 251). Accordingly, the purported exercise of the power of the State Secretary under para (1) of general order 40 of the General Orders of the Government of Sarawak ('the Sarawak General Orders') may not be applicable in that case as the respondent was transferred to another department. It also held that even assuming that the respondent was holding a common user post, it would appear that the only authority that could transfer the respondent would be the State Public Service Commission, Sarawak (the appellant) by virtue of art 36(1) of the Constitution of the State of Sarawak ('the Sarawak State Constitution') and r 7 of the Public Service Commission Rules 1964 ('the PSC Rules'). On appeal to the Court of Appeal, that decision was upheld. The appellant appealed. The questions sought to be determined were: (i) whether the respondent was in the common user service and who was to determine this; and (ii) who had the power to transfer the respondent.

Held, dismissing the appeal:

(1) Having analysed the affidavits, arguments and authorities, the court had no hesitation in holding that the respondent was not in the common user service. As to who was to determine whether this was so would be the appellant who was the appointing authority (see pp 362I–363A).

(2) It was evidently clear that the respondent's transfer in this case was from one department to another and it was only the appellant that had the power to do so by virtue of art 36(1) of the Sarawak State Constitution unless that power had been delegated (see p 363F-G).

(3) The appellant's argument that the State Secretary had the power to transfer the respondent based on general order 40 of the Sarawak general orders could not be correct as the respondent did not appear to fall within any of the categories in para (1) or (2) of general order 40. Further para (1) of general order 40 opens with the words 'subject to the provisions of the Public Service Commission Rules'. It is accepted that the appellant can, in the exercise of any of its functions, delegate its powers but there has never been a proper delegation of the power to transfer from the appellant to the State Secretary (see p 364C–E).

(4) The so-called instrument of delegation was dated after the date of purported transfer order and the retrospective effect of the instrument to the date before the purported transfer order cannot validate the order which was otherwise unlawful for to so would adversely affect the substantive right of the applicant as at the date of the order only the appellant had the power to order such a transfer (see p 367H–I).

[**Bahasa Malaysia summary**

Responden telah dilantik sebagai seorang pegawai am oleh perayu pada 2 Oktober 1961. Pada 16 April 1975, melalui satu pelantikan pindahan, beliau telah dilantik sebagai pegawai kanan kewangan ('PKK') di Jabatan Kerja Raya ('JKR') di Simanggang. Pada tahun 1977, beliau dipindahkan ke JKR di Kuching. Pada 28 April 1987, beliau telah diarahkan oleh Setiausaha Negeri untuk melaporkan diri dan berkhidmat sebagai PKK di Jabatan Perbendaharaan di Limbang. Responden enggan untuk memenuhi perintah pindahan tersebut dan Setiausaha Negeri telah melaporkan perkara tersebut kepada perayu di mana, berikutan tindakan tatatertib, memecat responden sebagai PKK di dalam Perkhidmatan Awam Sarawak pada 14 Disember 1988 berkuatkuasa pada 1 Januari 1989. Responden telah memohon satu perintah certiorari terhadap perayu untuk mengisytiharkan pemecatan beliau adalah tidak sah. Mahkamah Tinggi memutuskan bahawa skima PPK yang mana responden sertai bukan merupakan skima pengguna am (lihat [1990] 2 MLJ 251). Sewajarnya penggunaan kuasa yang dikatakan dilaksanakan oleh Setiausaha Negeri di bawah perenggan (1) perintah am 40 Perintah Am Kerajaan Sarawak ('Perintah Am Sarawak') tidak boleh terpakai di dalam kes tersebut kerana responden telah dipindahkan ke jabatan lain. Ia juga telah diputuskan bahawa walaupun dengan andaian responden memegang jawatan pengguna am, tampaknya satu-satunya pihak berkuasa yang dapat memindahkan responden adalah Suruhanjaya Perkhidmatan

A Awam Negeri, Sarawak (perayu) menurut perkara 36(1) Perlembagaan Negeri Sarawak ('Perlembagaan Negeri Sarawak') dan k 7 Kaedah Suruhanjaya Perkhidmatan Awam 1964 ('Kaedah SPA'). Semasa rayuan ke Mahkamah Rayuan, keputusan tersebut disahkan. Perayu telah membuat rayuan. Persoalan-persoalan yang dipohon untuk ditentukan adalah: (i) sama ada responden merupakan
B pengguna am perkhidmatan dan siapakah yang patut menentukan ini; dan (ii) siapa yang mempunyai kuasa untuk memindahkan responden.

Diputuskan, menolak rayuan tersebut:

C (1) Setelah menganalisa semua afidavit, hujahan dan autoriti, mahkamah tidak keberatan memutuskan bahawa responden bukan merupakan pengguna am perkhidmatan. Berkenaan dengan siapa yang patut menentukan sama ada ia adalah sedemikian terletak pada perayu yang merupakan pihak berkuasa yang dilantik (lihat ms 362I–363A).

D (2) Adalah amat jelas bahawa pemindahan responden di dalam kes ini adalah daripada satu jabatan ke jabatan yang lain dan hanya perayu yang mempunyai kuasa untuk berbuat demkian menurut perkara 36(1) Perlembagaan Negeri Sarawak kecuali jika kuasa tersebut telah diwakilkan (lihat ms 363F–G).

E (3) Hujah perayu bahawa Setiausaha Negeri mempunyai kuasa untuk memindahkan responden berdasarkan perintah am 40 Perintah Am Sarawak tidak mungkin betul kerana responden tidak terlingkung di bawah mana-mana kategori dalam perenggan (1) dan (2) perintah am 40. Tambahan pula, para (1) perintah am 40 dimulakan dengan perkataan 'tertakluk kepada peruntukan-
F peruntukan Kaedah Suruhanjaya Perkhidmatan Awam'. Adalah diterima bahawa perayu boleh, dalam melaksanakan mana-mana daripada fungsinya, mewakilkan kuasanya tetapi tidak pernah terdapat perwakilan kuasa yang sebenar untuk pemindahan daripada perayu kepada Setiausaha Negeri (lihat ms 364C–E).

G (4) Suratcara perwakilan yang dikatakan tersebut mempunyai tarikh selepas tarikh perintah pemindahan tersebut dan akibat retrospektif suratcara ke atas tarikh sebelum perintah pemindahan tersebut tidak boleh mengesahkan perintah yang jika sebaliknya adalah tidak sah kerana dengan berbuat demikian akan
H memberikan akibat bertentangan terhadap hak substantif pemohon memandangkan pada tarikh perintah tersebut hanya perayu yang mempunyai kuasa untuk memerintahkan pemindahan tersebut (lihat ms 367H–I).]

I **Notes**

For cases on dismissal of a public servant, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 519–543.

Cases referred to

Baltim Timber Sdn Bhd v The Minister of Resource Planning & Ors [1993] 1 AMR 567 (refd)
F Hoffman-La Roche & Co AG & Ors v Secretary of State for Trade and Industry [1974] 2 All ER 1128; [1974] 3 WLR 104 (refd)
Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685 (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (refd)
Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361 (refd)
Pengarah Pelajaran Wilayah Persekutuan & Ors v Loot Ting Yee [1982] 1 MLJ 68 (refd)
Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30 (refd)
Sarjit Singh Khaira v Government of the State of Sarawak & Anor [1990] 2 MLJ 251 (refd)
Smith v East Elloe Rural District Council & Ors [1956] AC 736 (refd)
Warwick Rural District Council v Miller-Mead [1962] 1 Ch 441 (refd)

Legislation referred to

Delegation of Powers (Transfer) Orders 1989
Government of Sarawak General Orders general orders 40, 40(1), (2)
Pensions (List of Pensionable Officers) Order 1976
Public Service Commission Delegation of Powers (Transfer) Orders 1989
Public Service Commission Revised Order on the Delegation of Power 1983
Public Service Commission Rules 1964 rr 2, 7
Rules of the High Court O 2, O 18, O 18 r 19
Sarawak State Constitution arts 36, 36(1), (3), (5), 37(3)
State Public Service Commission (Delegation of Powers) Direction 1992

Appeal from: Civil Appeal No Q–02–351 of 1996 (Court of Appeal, Kuala Lumpur)

Zaki Tun Azmi (*Wong Siong Tung* and *Celine Chelladurai* with him) (*Tan Yap & Tang*) for the appellant.

Lal Harcharan Singh (*Sarbjit Singh Khaira* with him) (*Khaira & Co*) for the respondent.

Abdul Malek Ahmad FCJ (delivering judgment of the court): When leave to appeal was granted by this court on 3 May 1999, the two questions sought to be determined in the appeal before us were firstly, whether the respondent was in the common user service and who is to determine this and secondly, who has the power to transfer the respondent.

The agreed facts were that the respondent was appointed a public officer by the appellant on 2 October 1961. On 16 April 1975, by way of

A appointment by transfer, he was made Senior Accounting Officer ('SAO') in the Jabatan Kerja Raya ('JKR') in Simanggang. In 1977, he was transferred to the JKR in Kuching.

On 28 April 1987, he was directed by the State Secretary to report and serve as SAO in the Treasury Department in Limbang. The respondent B refused to comply with the transfer order and the State Secretary reported the matter to the appellant which, following disciplinary action, dismissed the respondent from the post of SAO in the Sarawak Civil Service on 14 December 1988 effective from 1 January 1989.

The respondent applied for an order of certiorari against the appellant to declare his dismissal unlawful which was granted by the High Court and C on appeal to the Court of Appeal, that decision was upheld. Hence this appeal.

It is relevant to revert back to April 1975. Prior to that date, the respondent was a government officer in the Audit Department belonging to the Clerical and Technical Group. He had applied for the post of SAO, the D vacancy being in the JKR in Simanggang, in response to the appellant's notice inviting applications from Malaysian citizens domiciled in Sarawak and from serving government officers. The respondent attended the interview for the post which was in the Executive and Sub-Professional Group.

On 10 April 1975, the respondent was offered the post pursuant to an E appointment by transfer. The offer came from the office of the Chief Minister signed on behalf of the State Secretary. The appointment was on a permanent basis and on pensionable terms. The respondent was required to serve a probationary period of one year with effect from the date of his appointment meaning the date he assumed duties in the new post. He F accepted the offer and served the JKR in Simanggang and later in Kuching. He had, however, refused to comply with the transfer as SAO to the Treasury Department in Limbang pursuant to the State Secretary's letter dated 28 April 1987.

It would be quite appropriate at this stage to examine the earlier High Court decision on this matter (see *Sarjit Singh Khaira v Government of the* G *State of Sarawak & Anor* [1990] 2 MLJ 251) where the respondent as plaintiff had sued the government of the State of Sarawak and the relevant State Secretary for wrongful dismissal from the service of the first defendant and for arrears of pay. He sought a declaration that the second defendant acted wrongfully and in bad faith with an ulterior motive in procuring the purported dismissal. Both the defendants applied to set aside the writ and H service pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the RHC').

After dealing with the terms 'no reasonable cause of action', 'frivolous or vexatious' and 'abuse of the process of the court', which are contained in that Order, Haidar J (as he then was) said (at pp 252–253):

I

> Having thus set out the principles governing an application under O 18 r 19 of RHC, I will then apply them to the pleadings and the facts of this case. The thrust of the argument of counsel for the defendants is that the issue is

essentially one of transfer and therefore it is non-justiciable. He relied heavily on the Federal Court case of *Pengarah Pelajaran, Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68 in support thereof. To begin with, *Loot Ting Yee*'s case is solely confined to the issue of whether the power of the government to transfer its officers is reviewable by the courts. In this respect, the Federal Court at p 69 said:

> 'In our view as a civil servant holds office during pleasure, not only the length of his service is subject to pleasure but the place and time of his service is also similarly subject to pleasure. The only difference is that as regards dismissal and reduction in rank procedural safeguards contained in art 135 must be observed, whereas in cases of transfer and other matters so (sic) such safeguards need be followed. Thus whether a civil servant should be transferred, and if so where and when the transfer is to be made are matters for the government to decide. No useful purpose could thus be served in this case by holding a full trial of the respondent's allegations of mala fide and unreasonableness.'

In the present case, the plaintiff is not merely challenging the power of the defendants to transfer him, pure and simple as in *Loot Ting Yee*'s case, but whether he is liable to be transferred on the ground that he was not in the common-user service (see para 17(2) of the statment of claim) and thereby the resultant dismissal action of the plaintiff is brought into question. Therefore the facts of the present case are not on all fours with *Loot Ting Yee*'s case relied on by the defendants.

We must at once state that we were in total agreement with the finding that the facts in this appeal are quite distinguishable from those in *Loot Ting Yee*'s case where this court had rightfully refused to disturb the transfer order in that case as it held that no officer can claim to have a legal right of non-transferability because by joining the government service he became liable to transfere. Further, there was nothing in that case to show that the officer had been reduced in rank by the transfer.

In the respondent's earlier case, the court accepted the opinion that the SAO's scheme to which the plaintiff belonged is not a common user scheme. Accordingly, the purported exercise of the power of the second defendant under para (1) of general order 40 of the general orders of the Government of Sarawak ('the Sarawak General Orders') may not be applicable in that case as the plaintiff was transferred to another department. It also held that even assuming that the plaintiff was holding a common user post, it would appear that the only authority that could transfer the plaintiff would be the State Public Service Commission, Sarawak, the appellant here, by virtue of art 36(1) of the Constitution of the State of Sarawak (hereinafter 'the Sarawak State Constitution') and r 7 of the Public Service Commission Rules 1964 ('the PSC Rules'). It is patently clear that the purported powers of transfer claimed by the second defendant under the Sarawak General Orders have not been delegated to him as such by the appellant here which they could do by virtue of the powers conferred on it by art 37(3) of the Sarawak State Constitution. in that event, the Sarawak General Orders cannot override the express provision of the Sarawak State Constitution and the PSC Rules.

In any event, the court was satisfied that there was a cause of action in that case. In view of the facts disclosed and on the line of authority relating to an O 18 of the RHC application, the court was satisfied that that action was not frivolous or vexatious or an abuse of the process of the court. The issue of facts and law in respect of the case are matters that should be properly determined at the trial proper, and this was not an obvious and clear case for which O 18 of the RHC can be applied.

In respect of the alternative ground that the second defendant should cease to be a party on the ground that he had improperly or unnecessarily been made a party, the action filed against the second defendant is in his personal capacity. The court was of the view that this is not a proper case for the exercise of its discretion under O 2 of the RHC. As to whether there has been any tort committed by the second defendant, the court held that these matters raised by both parties. In their affidavits were mainly questions of fact to be decided at trial.

The appeal against that decision was dismissed by the Supreme Court on 8 May 1991.

At the hearing of the application for certiorari in this case, Abdul Kadir Sulaiman J had this to say as regards the delegation of the power to transfer (see [1995] 3 MLJ 112 at pp 120–121):

> Whatever meaning to be given to those terms, to my view, is not an issue of much importance. The central issue really is whether the State Secretary has any power at all on his own, to transfer a public officer of the state from one department of government to another as intended in this case. Order 40(1)(a) of the general orders appears to have given him that power, but it is merely confined to administrative officers, officers of the Sarawak Administrative Service and officers of the General Clerical Service and that power is to be exercised subject to the provisions of the [Public Service Commission] Rules. From the evidence, the applicant does not belong to any one of those categories of officers. He belongs to the Executive and Sub-Professional Group. Rule 2 of the Public Service Commission Rules 1964 ('the Rules') defines 'transfer' to mean, inter alia, the conferment upon a person in the public service of the state of a public office in any department other than that in which he last held substantive appointment. In other words, the movement of an officer from one department of the government to another department of government. Rule 7 thereof deals with the procedure, inter alia, for the transfer of officers. There is nothing in r 7 which would suggest that the State Secretary can personally exercise his power to transfer an officer in the category of the applicant outside his department, ie from the JKR to another department. The only way then for the State Secretary to lawfully transfer the applicant in the present circumstances is by way of a written direction by the PSC delegating such a power to him as required by art 36(6) of the Constitution of the State of Sarawak ('the Constitution') as the original power to transfer officers from one department of government to another, vests with the PSC personally pursuant to art 36(1) of the Constitution. Article 36(1) of the Constitution, subject to the provisions of the Federal Constitution and of the Constitution itself, places the duty to transfer the members of the public service of the state to the PSC. This duty of the PSC, however, may by cl 6 be delegated by the PSC to any public officer, or to any board of public officers appointed by it by way of directions in writing. Therefore, for the State

Secretary to validly exercise the power of transfer of the applicant from one department of the government, ie the JKR to another department, ie the Treasury Department, it must be in pursuance to the delegation of powers given by the PSC. Without this express delegation, the State Secretary, on his own, has no power to transfer a member of the public service from one department of government to another. It is irrelevant whether the PSC subsequent to the order for transfer, agrees with the decision so made by the State Secretary personally. The PSC cannot ratify the unlawful act of the State Secretary by such agreement. As Lord Tenterden CJ said in 1831 in *Doe d Rochester (BP) v Bridge* (1831) 109 ER 1001:

> '... where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'

Thus, in relation to the applicant, it is irrelevant to consider the provisions of O 40(1) of the general orders when dealing with the issue of the purported transfer order made upon him, as his transfer would involve the movement from one department to another which, if it is to be done by the State Secretary must be with the delegated power given to him by the PSC in accordance with art 36(6) of the Constitution. Without such express delegated power the order of the State Secretary cannot be a lawful order. In this case the applicant was charged by the PSC to have contravened O 69 of the general orders for failure to comply with the lawful orders of the government which is the purported transfer order issued upon him by the State Secretary. The said O 69 states:

> 'An officer who at any time wilfully neglects or refuses or, from illness occasioned by his own misconduct, becomes unable to obey any lawful order of the Government or is guilty of any other misconduct shall be liable to dismissal without notice.'

Therefore, for the PSC to be able to resist this application of the applicant for certiorari, it must show that the purported order of the State Secretary was done upon the express delegation of power given to him by the PSC. If this is shown, then the order of the State Secretary is a lawful one, and therefore, it was rightly within the jurisdiction of the PSC to institute disciplinary action against the applicant for his refusal to comply with the said order. The power to exercise disciplinary control over members of the public service of the state is clearly with the PSC, pursuant to art 36(1) of the Constitution. However, if the said order is not lawful, then clearly the PSC is acting outside its jurisdiction in so assuming the jurisdiction resulting in the order of dismissal of the applicant. Thus, the jurisdiction of the PSC is dependent on the lawfulness or otherwise of the purported order of transfer of the State Secretary. ...

On this point, the Court of Appeal's finding was that (see [1999] 1 MLJ 618 at pp 632–633):

> ... In our view, firstly, 'transfer' in general order 40 does not bear the same meaning as 'transfer' in r 2 of the PSC Rules. Secondly, general order 40 is not a direction in writing under art 36(6) of the State Constitution. Thus, whether the transfer order is made under general order 40(l)(a) or general order 39 read with general order 40(2), we hold that the State Secretary has no power thereunder, concurrent or delegated, to decide on matter (a) in the transfer order. 'Transfer' in general order 40 refers to the transfer from one part of Sarawak to another part of Sarawak, that is to say, transfer within the

State of Sarawak: see also the meanings of 'Resident' and 'Reference to Resident and/or Head of Department' respectively in general order 1. In our opinion, general order 40 refers to the right of State Government as employer to transfer its civil servants to any part of Sarawak and is a standing instruction from the State Government to the State Secretary, the appropriate Head of Department and the Resident of an administrative Division regulating who among them is to decide on behalf of the State Government on routine transfer of civil servants from one part of Sarawak to another in the ordinary course of administration involving the various categories of civil servants with the State Secretary retaining an overall say in special circumstances where such transfer is necessitated by the interests of the public service. Thus whether SSK should or should not be transferred to the Divisional Office of the State Treasury Department in Limbang in the 5th Division of Sarawak as in matter (b) above is a matter for the Yang di Pertua Negeri or the State Government to decide and we hold accordingly. Assuming (i) that in matter (a) above the PSC has duly decided that SSK should be so transferred and (ii) the transfer was routine, under general order 40(1)(b) the State Accountant General as Head of the State Treasury Department is instructed to decide on matter (b). Again, assuming (i) above and (ii) that the transfer was under special circumstances necessitated by the interests of the public service, then the State Secretary is instructed under general order 40(2) to decide on matter (b).

In the light of our holding that the State Secretary has no power concurrent or delegated under general order 40(1)(a) or general order 39 read with general order 40(2) to decide on matter (a) in the transfer order we find no merit in the other arguments of the PSC under the sub-head '2 State Secretary has power to transfer even without the 1989 retrospective Delegation'. With respect, in our view, these other arguments are confused and the confusion stems basically from a failure to distinguish between the function of transfer of the civil servant from one post to another and from one department to another which is assigned to the PSC and the right to transfer the civil servant from one part to another within the State of Sarawak which remains with the State Government as the employer.

As an opener in this appeal, learned counsel for the respondent had referred us to the Pensions (List of Pensionable Officers) Order 1976, effective from 1 January 1970, which had categorized the officers and classes of officers in the public service under the Government of the Federation in Sarawak or under the Government of Sarawak as pensionable officers under two main headings; the 'common user services' and 'offices found in more than one department'. The former includes the General Clerical Service, the Administrative Service and the Sarawak Administrative Service. The post of SAO, which the respondent held at the time of the disputed transfer and subsequent dismissal, came under the latter, which clearly points to the fact that the respondent was not in the common user service.

On the other hand, learned counsel for the appellant relied on the joint circular memorandum dated 25 August 1967 issued by the Federal Secretary and the State Secretary to say that the post of SAO was a common user post. In that memorandum, it was stated that the nomenclatures and scales of some of the common user posts are rather diverse despite identical entry qualifications and similar duties and to iron out such anomalies, the

said nomenclatures and scales of the common user posts had been standardized since 1 January 1968. A

For the nomenclature SAO, it had the scale C4–5 and a look at Appendix E to the memorandum which dealt with accounting officers, there were only six departments listed namely the Co-operative Development, Inland Revenue, Trade Division, Posts and Telecoms, Printing and Treasury. The Public Works Department or, in the Malay language, the JKR was not included. Moreover, in the letter of offer to the respondent for the post of SAO in the Public Works Department in Simanggang dated 10 April 1975, the scale is given as C3–5 and not C4–5. B

A clear distinction had also been made in the appellant's notices advertising the various vacancies in the common user posts and the offices found in more than one department. For example, the post of Assistant Secretary, Administrative Assistant and Clerk which respectively falls under the three common user services of Sarawak Administrative Service, Administrative Service and General Clerical Service, the category of offices stated are 'for the Ministries', 'Various Departments' and 'Various Ministries/Departments' whereas the advertisement for the post of SAO in the grade C3–5 in the Public Works Department is advertised specifically for the Public Works Department although that position is found in more than one department and is not in one of the three common user services. In the same way, a similar advertisement for the same post in the State Treasury specifically states the department as the State Treasury Department. In another joint advertisement in the same notice for the same post in both the Public Works Department and the State Treasury, the two departments are stated separately with different duties although the post is the same. C D E

These notices indicate a distinction between posts in the common user service and those that are not in that the department or ministry is not specified in the former but is mentioned in the latter. F

It was also brought to our attention that in 1980 the Sarawak Government Officers Association, coincidentally then represented by the respondent as its president, had raised the issue of upgrading the salary of SAO Sarawak from B3 to A22 when they opted for the Cabinet Committee salary revision before the Public Services Tribunal. We pause to mention here that learned counsel for the respondent had in his written submissions implied malice and bad faith on the part of the appellant because of the earlier action taken by the respondent but since this point was never argued before us in view of the two questions raised, we shall ignore this part of the submissions. The Sarawak Accountant General in his testimony before that Tribunal had said that unlike those in the Peninsular, the accounting officers' service in Sarawak is not a 'common user' service. The Tribunal had arrived at the same conclusion in their decision which in turn was accepted by the High Court in the earlier suit brought by the respondent as seen from the extract of the relevant judgment cited earlier. G H I

Having analysed the affidavits, arguments and authorities, we had no hesitation in holding that the respondent was not in the common user

service. As to who is to determine whether this was so would of course be the appellant who is the appointing authority.

As for the power to transfer the respondent, the functions of the appellant are spelt out in art 36 of the Sarawak State Constitution and in our view, the relevant clauses would be cll (1), (3) and (6) which are reproduced below for ease of reference:

> (1) Subject to the provisions of the Federal Constitution and of this Constitution, it shall be the duty of the Commission to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the public service.
>
> (2) ...
>
> (3) In clause (1), 'member of the public service' does not include any person whose remuneration is calculated on a daily rate, and 'transfer' does not include transfer without a change of rank within a department of Government.
>
> (4) ...
>
> (5) ...
>
> (6) The Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate to any public officer, or to any board consisting of at least one member of the Commission and such number of public officers appointed by it, any of its functions under clause (1) in respect of any grade of members of the public service, and that officer or board shall exercise those functions under the direction and control of the Commission.
>
> (7) ...
>
> (8) ...

Under the PSC Rules, r 2 defines 'transfer', for a person in the public service of the State, as the conferment of a public office in any department other than that in which he last held substantive appointment. The appointment, promotion and transfer in the public service is detailed in r 7.

It is evidently clear that the respondent's transfer in this case was from one department to another and it is only the appellant that has the power to do so by virtue of art 36(1) of the Sarawak State Constitution unless that power has been delegated.

General order 40 of the Sarawak General Orders state:

> (1) Subject to the provisions of the Public Service Commission Rules, transfer of officers within Sarawak shall normally be effected as follows —
>
> (a) administrative officers, officers of the Sarawak Administrative Service and officers of the General Clerical Service otherwise than within the same administrative Division or Department by the State Secretary;
>
> (b) departmental officers within the same Department, by the Head of that Department;
>
> (c) officers of the General Clerical Service within the same administrative Division or Department, by the appropriate Resident

or Head of Department who shall inform the State Secretary accordingly. A

(2) Notwithstanding the provisions of para (1) above, the State Secretary may effect the transfer of any officer without the consent of a Resident or Head of Department if such transfer is considered by him to be in the interests of the public service. B

(3) Transfer will be regarded as of a temporary nature when —

(a) it is declared as such and an officer is so informed prior to transfer; and

(b) the duration of the transfer is for a period not exceeding two months or such longer period as the State Secretary may, in any particular case, approve. C

Learned counsel for the appellant based his argument on the said general order to submit that the State Secretary had the power to transfer the respondent. This cannot be correct as the respondent does not appear to fall within any of the stated categories in para (1) or (2) of general order 40. D

In any case, general order 40 provides that the general orders have no force in law except in so far as they set out the provisions of an Ordinance or Act of Parliament although disobedience of or failure to observe a general order by an officer may form the basis of a disciplinary charge.

Further, para (1) of general order 40 opens with the words 'subject to E the provisions of the Public Service Commission Rules'. It is accepted that the appellant can, in the exercise of any of its functions, delegate its powers but as learned counsel for the respondent had argued, there has never been a proper delegation of the power to transfer from the appellant to the State Secretary as it must be made in writing with the approval of the Yang di Pertua Negeri under art 37(3) of the Sarawak State Constitution and F published in the Gazette. Although we agree that the approval of the Yang di Pertua Negeri is required by virtue of the clause in that article, there is really no necessity or requirement, having considered the relevant statutes on delegation and interpretation, for the delegation of power to be published in the Gazette. G

Learned counsel for the appellant had referred us to an official memorandum dated 11 October 1967 from the Secretary of the appellant to the State Secretary which states:

> I am directed to inform you that the Commission, having carefully considered the contents of your above-quoted memorandum and at a meeting held on H 20 December 1967, decided to delegate to you the power to transfer, without change in rank or status, members of the Administrative Service, of the General Clerical Service and of the Common User Service. The full details of this delegation of powers are contained in the attached Letter of Delegation No 1/67.
>
> 2 With regard to the memorandum 8/59 of 16 August 1967 from the I Registrar, High Court, I should be grateful if you would inform him accordingly of the powers now delegated to you by the Commission.

A Sgd

(Yi Fung Mu)
Secretary,
Public Service Commission

The said letter of delegation No 1/67 is reproduced below for ease of
B reference:

Letter of Delegation No 1/67
Delegation of Powers
by
The Public Service Commission

C Under cl (6) of art 36 of the Constitution of the State of Sarawak

In exercise of the powers conferred by cl (6) of art 36 of the State Constitution, the Public Service Commission hereby delegates to the State Secretary the power to transfer members of the Public Service who are serving in any department and holding any of the appointments and duty posts specified in the Schedule hereunder:

D Provided that nothing in this letter shall authorize the State Secretary to effect any transfer which will result in any change in rank status any or salary scale of a member of the public service so transferred in exercise of the delegated powers.

E Schedule

	Appointments or duty posts	Divisions and salary scale	Remarks
1	Clerk	) Division III, D1A, 1–3	) Commonly known
			) as appointments in
F			) the General
			) Clerical Service
2	Clerk	)	)
3	Senior Clerk	)	)
4	Chief Clerk	)	)
G			
5	Clerk, Special Grade	) Division III, D4–5	)
6	Workshop Clerk	)	)
7	Personal Assistant	)	)
H 8	Stenographer	) RM290 pm (fixed)	)
9	Asst Private Secretary	) Division II, C3	) Commonly known
			) appointments in
			) the Common User
I			) Service
10	Deputy Clerk to Council Negri	)	)

11	Administrative Asst, Grade II	) Division II, C4		A
12	Administrative Asst, Grade I	)		
13	Asst Secretary	) Division II, C4–5		B
14	Asst Training Officer	)		
15	Private Secretary	) Division I, Scale A	) Duty posts) normally held by) Administrative) Officers	C
16	Clerk to Council Negri	)		
17	Secretary (PSC)	)		
18	Principal Asst Secretary	)		D
19	Training Officer	)		
20	Deputy State (see 19)	) Division I, Superscale) Group 6	) Duty posts) normally held by) Administrative) Officer Class 1	E
21	Permanent Secretary	)		
22	Deputy State Financial Secretary	)		F

Dated this 20th day of December 1967.

Sgd
(Yi Fung Mu)
Secretary,
Public Service Commission G

For the record, the words 'Establishment Officer' in item 20 had been cancelled and replaced by the handwritten words now appearing.

This was eventually replaced by the Public Service Commission Delegation of Powers (Transfer) Orders 1989 which, although dated 28 November 1989, was backdated to 20 December 1967. Then we have the State Public Service Commission (Delegation of Powers) Direction 1992 published in the Sarawak Government Gazette on 17 December 1992, but which came into force only on 1 January 1993, delegating all the appellant's powers under art 36(1) of the Sarawak State Constitution to the State Secretary and at the same time revoking both the Public Service Commission Revised Order on the Delegation of Power dated 1 March H I

A 1983 and the Delegation of Powers (Transfer) Direction 1989 as specified in the Circular Letter Bil 1/89 dated 28 November 1989 issued by the appellant.

As for the 1967 memorandum, it only remained a memorandum as it was never gazetted. In any case, the respondent's post was not listed therein.
B As for the 1989 direction, both the memorandum and the gazette notification have been included in the appeal record. The reasons stated in that memorandum indicate that the 1967 exercise was no longer appropriate in view of the changes in the nomenclatures and salary scales and the abolition of certain posts and the creation of new posts. To backdate it almost 22 years earlier is beyond our comprehension. A check
C at the library also showed that this gazette notification was never gazetted. Only the 1992 gazette notification of the delegation of powers had been published.

Learned counsel for the appellant also urged us to consider the fact that a Government officer is liable to be transferred anywhere and the court does not look at the reasonableness of the transfer (see *Pengarah Pelajaran,*
D *Wilayah Persekutuan & Ors v Loot Ting Yee*), that the State Secretary is an agent of the appellant which justifies the delegation (see *Warwick Rural District Council v Miller-Mead* [1962] 1 Ch 441), that a retrospective law is valid (see *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 and *Loh Kooi Choon v Government of Malaysia* [1977]
E 2 MLJ 187), that a decision is valid unless declared otherwise by the court which meant that the respondent should comply with the transfer order unless and until it is declared void (see *Baltim Timber Sdn Bhd v The Minister of Resource Planning & Ors* [1993] 1 AMR 15 567 and *Smith v East Elloe Rural District Council & Ors* [1956] AC 736), that the time for disputing the threshold jurisdiction of the appellant was when the transfer order was
F made or at the latest when the State Secretary reported the non-compliance of the transfer order (see *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685), and that the court should not grant discretionary leave when the effect would be the reinstatement of the respondent (see *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361).

G We are conscious of the fact that one of the submissions of learned counsel for the appellant was that the appellant was not aware of any order from any competent court declaring the said transfer order void, unlawful or invalid. However, the central issue really is whether the State Secretary has any power at all on his own to transfer a public officer of the State from
H one government department to another.

It must be remembered, and emphasized, that the so-called instrument of delegation was dated after the date of purported transfer order and the retrospective effect of the instrument to the date before the purported transfer order cannot, in our view, validate the order which is otherwise unlawful for to do so would adversely affect the substantive right of the
I applicant as at the date of the order only the appellant had the power to order such a transfer.

On this point, the learned High Court judge in these proceedings at first instance had said (see [1995] 3 MLJ 112 at pp 126–127):

> It is also said that the PSC is entitled to presume the transfer order of the State Secretary to be valid unless the said order was first declared by the court in a proper proceeding that it is invalid. It is submitted that up to now there has been no final order of any court of law quashing the decision made by the State Secretary to transfer the applicant. Thus, at the time when the PSC made the decision to dismiss the applicant, the transfer order was not challenged in any court of law competent to pronounce upon the legality or lawfulness or otherwise of the transfer order. By this submission, I take it that the learned counsel is saying that the PSC had proper jurisdiction to institute disciplinary proceedings against the applicant on the ground that the order of the State Secretary was lawful unless and until pronounced otherwise by a court of competent jurisdiction. Since no pronouncement has been made so far, the applicant cannot question the validity of the order. In support, the case of *F Hoffman-La Roche & Co AG & Ors v Secretary of State for Trade and Industry* [1974] 2 All ER 1128; [1974] 3 WLR 104 was cited, particularly to the dicta of Lord Diplock [1974] 2 All ER 1128 at p 1153; [1974] 3 WLR 104 at p 131 thus:
>
> > 'Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes, either brought by one party to enforce the law declared by the instrument against another party, or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it, are presumed.'
>
> Again, the point is missed because first, the order of the State Secretary is not a statutory instrument made pursuant to an Act of Parliament. Secondly, we are here dealing with the jurisdiction of the PSC to institute disciplinary proceedings against the applicant. The condition precedent to the jurisdiction is to be based on the existence of the basis of the allegation of misconduct on the part of the applicant. If upon proper inquiry or investigation as required by r 26(1)(b) of the [Public Services Commission] Rules there is a basis to show that the applicant had committed misconduct, then the PSC has proper jurisdiction to frame a charge and to require the applicant to answer to exculpate himself of the charge. But in this case, as stated earlier, if a proper investigation was done instead of merely paying a lip service to the provisions of the rule, the PSC would have discovered that the State Secretary has issued the order without proper authority. The PSC was prepared to merely go along with the State Secretary in saying that it agreed with the order even though It was issued contrary to the provisions of the Constitution. It is a sad day if in such a case the applicant cannot bring these proceedings to quash the order of the PSC simply on the ground that he had not first taken the matter of the validity of the transfer order to be adjudicated by the court. In any event, the presumption, if any, is rebutted by the fact that there was no valid delegation of power given by the PSC to the State Secretary for the attempted transfer of the applicant from one department of government to another as required by the Constitution.

A At the end of it all, we can only agree with the findings of the High Court and the Court of Appeal that there had been no proper delegation of the appellant's power to transfer to the State Secretary on the dates of the respondent's transfer and his subsequent dismissal was, therefore, not valid.

In the event, we would answer the two questions in this manner:

B (a) the respondent is not in the common user service which issue is to be determined by the appellant; and

(b) it is the appellant who has the power to transfer the respondent unless it has delegated that power to any person or body of persons.

C Consequently, the appeal is dismissed with costs. The deposit is to go to the respondent to the account of his taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar

D

E

F

G

H

I